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No. 07-1116

In the Supreme Court of the United States

FIDEL CINTORA AGUILAR, PETITIONER

v.

MICHAEL B. MUKASEY, ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

In 1996, Congress repealed Section 212(c) of the Immigration and Nationality Act, 8 U.S.C. 1182(c) (1994), which provided for a discretionary waiver of deportation, and replaced it with another form of discretionary relief not available to aliens convicted of certain crimes, including aggravated felonies and crimes involving moral turpitude. In *INS* v. *St. Cyr*, 533 U.S. 289 (2001), this Court held that the repeal of Section 212(c) should not be construed to apply to an alien previously convicted of an aggravated felony through a plea agreement at a time when the conviction would not have rendered the alien ineligible for discretionary relief under that section. The questions presented are:

1. Whether this Court's holding in *St. Cyr* applies to an alien found guilty by a jury of a crime involving moral turpitude and who was not subject to deportation at the time he decided not to appeal the jury's finding.

2. Whether Congress's expressly retroactive application of the definition of "conviction" in 8 U.S.C. 1101(a)(48) violated petitioner's due process rights by rendering him deportable on the basis of an offense for which he was not previously deportable.

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OPINIONS BELOW

The order of the court of appeals (Pet. App. 1) is unreported. The orders of the Board of Immigration Appeals (Pet. App. 2-4) and the immigration judge (Pet. App. 5-13) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 2, 2007. A petition for rehearing was denied on November 28, 2007 (Pet. App. 20-21). The petition for a writ of certiorari was filed on February 26, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Section 212(c) of the Immigration and Nationality Act (INA), 8 U.S.C. 1182(c) (1994) (repealed 1996), au-

thorized permanent resident aliens domiciled in the United States for seven consecutive years to apply for discretionary relief from exclusion, subject to certain exceptions. While, by its terms, Section 212(c) applied only to exclusion proceedings, it was construed to apply as well to deportation proceedings. See *INS* v. *St. Cyr*, 533 U.S. 289, 295 (2001).

In 1996, Congress amended Section 212(c) to make ineligible for discretionary relief aliens previously convicted of certain criminal offenses, including aggravated felonies and crimes involving moral turpitude. See Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 440(d), 110 Stat. 1277; see also *St. Cyr*, 533 U.S. at 297 n.7. Later that year, in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), see Pub. L. No. 104-208, Div. C, § 304(b), 110 Stat. 3009-597, Congress repealed Section 212(c) in its entirety, and replaced it with Section 240A of the INA, 8 U.S.C. 1229b, which now provides for a form of discretionary relief known as cancellation of removal that is not available to many criminal aliens, including those who have been convicted of a "crime involving moral turpitude," 8 U.S.C. 1182(a)(2)(A), 1229b(1)(C).

In IIRIRA, Congress also introduced for the first time a definition of "conviction" for purposes of the INA. Included within that new definition of a "conviction" are some circumstances in which an adjudication of an alien's guilt was technically "withheld" but the alien was found guilty and sentenced to some punishment or penalty. See IIRIRA § 322(a)(1), 110 Stat. 3009-628 (8 U.S.C. 1101(a)(48)(A)). Congress specified that the new definition of conviction would apply to convictions that occurred before IIRIRA's enactment. See IIRIRA § 322(c), 110 Stat. 3009-629 ("The amendments made by

[Section 322(a)] shall apply to convictions and sentences entered *before*, on, or after the date of the enactment of this Act.") (emphasis added).

But Congress was not so specific about whether IIRIRA's repeal of Section 212(c) and replacement with Section 240A should apply to aliens who were convicted prior to the enactment of IIRIRA. In *St. Cyr*, this Court held, based on principles of non-retroactivity, that IIRIRA's repeal of Section 212(c) should not be construed to apply to an alien who had been convicted of an aggravated felony through a plea agreement at a time when the conviction would not have rendered the alien ineligible for discretionary relief under Section 212(c). See 533 U.S. at 314-326; see also *id.* at 318-319 & n.43 (contrasting Congress's "unambiguous[] * * * intention" to apply "specific provisions" of IIRIRA retroactively, including Section 322(a)(1)'s definition of "conviction," with its failure to be so specific about the retroactive effect of its repeal of Section 212(c)). In particular, the Court in *St. Cyr* explained that, before 1996, aliens who decided "to forgo their right to a trial" by pleading guilty to an aggravated felony "almost certainly relied" on the chance that, notwithstanding their new convictions, they would still have some "likelihood of receiving § 212(c) relief" from deportation. *Id.* at 325.

2. Petitioner is a native and citizen of Mexico who was admitted to the United States for lawful permanent residence on December 1, 1990. Pet. App. 6. In 1993, he was charged in Idaho state court with raping a 14-year-old girl. *Id.* at 7; Pet. 4. On February 2, 1994, a jury found him guilty of the lesser-included offense of lewd and lascivious conduct with a child under sixteen years of age. Pet. App. 6; Pet. 4. On March 28, 1994, the court entered an "Order Withholding Judgment," pursuant to

which petitioner was placed on supervised probation. Pet. 4-5. Petitioner's attorney later explained that she sought the order withholding judgment in an attempt to prevent petitioner from having a "conviction" that would make him deportable. Pet. App. 15-16. She also claimed that, because petitioner was no longer concerned about deportation, she advised him not to appeal his sentence, and thus did not pursue an argument that he had been subjected to "selective prosecution on the basis of race and ethnic discrimination" when state prosecutors failed to pursue a separate "statutory rape case involving a Caucasian couple." *Id.* at 16. Two years later, Congress added to the INA the definition of "conviction" that specifically included orders like the one withholding judgment in petitioner's criminal case, and Congress expressly made that amendment applicable to convictions entered prior to the enactment of IIRIRA. See pp. 2-3, *supra*.

3. a. In January 2007, when petitioner was returning to the United States from a trip to Mexico, he was arrested at a port of entry in Texas and paroled into the country. Pet. App. 6. The Department of Homeland Security (DHS) commenced removal proceedings, alleging that petitioner is removable because he is an alien who has been convicted of a crime involving moral turpitude. *Ibid.*; see 8 U.S.C. 1182(a)(2)(A)(i)(I).

b. In the removal proceedings, petitioner denied both that he had been convicted of a crime involving moral turpitude and that he is removable. Pet. App. 6. The immigration judge (IJ) found that DHS had proved by clear and convincing evidence that petitioner had been convicted of a crime involving moral turpitude and, therefore, that he was removable as charged. *Id.* at 7.

Petitioner then moved to terminate the proceedings, asking the IJ to reconsider the finding that he had been convicted of a crime involving moral turpitude based on his assertion that the application of IIRIRA's definition of "conviction" to his withheld judgment is manifestly unjust and thus violates due process. Pet. App. 7, 8. Alternatively, petitioner sought a waiver of removal under Section 212(c), alleging that he detrimentally relied on the availability of Section 212(c) relief when he waived his right to appeal the jury verdict finding him guilty of lewd and lascivious conduct with a child under sixteen years of age. *Id.* at 7, 9.

The IJ denied petitioner's motion, ruling that it lacked jurisdiction over the due process claim, and noting that, in any event, similar arguments had already been rejected by the Fifth Circuit. Pet. App. 8-9 (citing *Madriz-Alvarado* v. *Ashcroft*, 383 F.3d 321 (2004), and *Moosa* v. *INS*, 171 F.3d 994, 1006-1007 (1999)). The IJ also denied petitioner's Section 212(c) application, ruling that, although such relief may be available to criminal aliens who proceeded to trial, *Carranza-de Salinas* v. *Gonzales*, 477 F.3d 200, 205 (5th Cir. 2007), by petitioner's own admission, he was not deportable or inadmissible when he accepted his withheld judgment, because withheld judgments were not then considered "convictions" by the Board of Immigration Appeals (BIA). Pet. App. 11 (citing *In re Ozkok*, 19 I. & N. Dec. 546 (B.I.A. 1988)). The IJ thus determined that, in choosing not to appeal, petitioner relied on his not being deportable under the BIA's interpretation of "conviction" (which was later abrogated by statute) rather than any expectation that he would be eligible for discretionary relief from deportation under Section 212(c). *Id.* at 12 (citing *Carranza-de Salinas*, *supra*, and *St. Cyr*, 533

U.S. at 289). The IJ ordered petitioner removed to Mexico. *Id.* at 13.

c. The BIA affirmed the IJ's decision, finding that the IJ properly determined that petitioner had a "conviction" for immigration purposes. Pet. App. 2-4. The BIA agreed that Fifth Circuit precedent foreclosed petitioner's due process argument about Congress's retroactive application of IIRIRA's definition of "conviction" and that, in any event, the agency was without jurisdiction to rule on the constitutionality of the statutes and regulations that it administers. *Id.* at 3. Additionally, the BIA agreed with the IJ's denial of petitioner's Section 212(c) application, ruling that his waiver of "his right to appeal to avoid the consequences of having a conviction for immigration purposes does not demonstrate the requisite reliance on the continued availability of section 212(c) relief." *Id.* at 4.

4. The court of appeals summarily affirmed the BIA without opinion in an unpublished per curiam order. Pet. App. 1. The court construed petitioner's subsequent motion for rehearing en banc as a motion to reconsider and denied it in an unpublished per curiam order. *Id.* at 20-21.

ARGUMENT

1. Petitioner contends (Pet. 13-18) that this Court's holding in *INS* v. *St. Cyr*, 533 U.S. 289 (2001), which involved aliens convicted of an aggravated felony after a plea agreement, should be extended to aliens who were found guilty of a deportable offense after a jury trial. He contends that, insofar as it rejected that argument, the Fifth Circuit's summary affirmance of the agency's decision conflicts with this Court's holdings in *St. Cyr* and *Hughes Aircraft Co.* v. *United States ex rel. Schu-*

mer, 520 U.S. 939 (1997), and with the Tenth Circuit's decision in *Hem* v. *Maurer*, 458 F.3d 1185, 1197 (2006). The petition should be denied because the Fifth Circuit's decision is correct. Moreover, this case is not a suitable vehicle for deciding the question presented because—in light of the pre-1996 definition of "conviction"—petitioner had no expectation that he was even deportable. He therefore could not have relied on any expectation that he would be eligible for discretionary relief from deportation under former Section 212(c). Congres has now clearly provided that his conviction does render him deportable. Although petitioner has identified some disagreement among the courts of appeals about whether *St. Cyr*'s reasoning applies to aliens convicted after a jury trial or to aliens who chose not to appeal their convictions, petitioner's pre-IIRIRA lack of a "conviction" renders that disagreement irrelevant to his case.

a. Although its lack of explanation makes it unsuited for this Court's review in any event, the Fifth Circuit's summary affirmance of the agency's decision is correct. As both the BIA and the IJ noted (Pet. App. 4, 11-12), and as petitioner concedes when he states that he accepted the withheld judgment "with the assurance that it would not result in his deportation," Pet. 24, when petitioner decided whether to forgo his right to appeal, he did not subjectively or objectively rely upon the likelihood that he might later receive Section 212(c) relief from deportation. Instead, petitioner accepted the withheld judgment and decided not to appeal because such a judgment was not then deemed a "conviction" for immigration purposes and therefore did not render him deportable at all. Pet. 5; Pet. App. 15-17.

b. Although petitioner has identified a conflict among the circuits about the *type* of reliance that is required under *St. Cyr* to establish a retroactive effect (Pet. 19-23), that conflict is irrelevant to the instant case. The cases petitioner cites to demonstrate the conflict discuss the repeal of Section 212(c) relief, but, as the BIA correctly explained, that repeal had no effect on petitioner's decision not to appeal his sentence or the jury's determination that he was guilty of a crime involving moral turpitude. As petitioner himself concedes (Pet. 24), he gave up his right to appeal *not* in hopes of obtaining Section 212(c) relief from deportation, but in hopes of avoiding a "conviction" that would render him deportable in the first place.

c. Even if this case properly turned on whether the elimination of Section 212(c) relief has a retroactive effect on aliens found guilty "after a jury trial" (Pet. i, 10, 13), the denial of relief would be correct. In *St. Cyr*, this Court placed considerable emphasis on the fact that "[p]lea agreements involve a *quid pro quo*," whereby, "[i]n exchange for some perceived benefit, defendants waive several of their constitutional rights (including the right to a trial) and grant the government numerous tangible benefits." 533 U.S. at 321-322 (citation and internal quotation marks omitted). In light of "the frequency with which § 212(c) relief was granted in the years leading up to AEDPA and IIRIRA," the Court concluded that "preserving the possibility of such relief would have been one of the principal benefits sought by defendants deciding whether to accept a plea offer or instead to proceed to trial." *Id.* at 323. And because, in the Court's view, aliens in St. Cyr's position "almost certainly relied upon th[e] likelihood [of receiving § 212(c) relief] in deciding whether to forgo their right to a trial,"

the Court held that "the elimination of any possibility of § 212(c) relief by IIRIRA has an obvious and severe retroactive effect." *Id.* at 325.

At least seven circuits have declined to extend the holding of *St. Cyr* generally to aliens convicted after going to trial rather than pleading guilty, precisely because this Court's decision in *St. Cyr* emphasized the showing of reliance provided by a guilty plea. See *Dias* v. *INS*, 311 F.3d 456, 458 (1st Cir. 2002), cert. denied, 539 U.S. 926 (2003); *Rankine* v. *Reno*, 319 F.3d 93, 102 (2d Cir.), cert. denied, 540 U.S. 910 (2003); *Mbea* v. *Gonzales*, 482 F.3d 276, 281-282 (4th Cir. 2007); *Hernandez-Castillo* v. *Moore*, 436 F.3d 516, 520 (5th Cir.), cert. denied, 127 S. Ct. 40 (2006); *Lara-Ruiz* v. *INS*, 241 F.3d 934, 945 (7th Cir. 2001); *Zamora* v. *Gonzales*, 240 Fed. Appx. 150, 152-153 (7th Cir. 2007), cert. denied, No. 07-820 (Apr. 21, 2008); *Armendariz-Montoya* v. *Sonchik*, 291 F.3d 1116, 1121-1122 (9th Cir. 2002), cert. denied, 539 U.S. 902 (2003); *Hem*, 458 F.3d at 1189 (10th Cir. 2006). See also *Fernandez-Vargas* v. *Gonzales*, 126 S. Ct. 2422, 2431-2432 (2006) (explaining *St. Cyr*'s rationale based on *quid pro quo* arrangement in guilty plea). Only the Third Circuit has held that no showing of reliance is required and that new legal consequences attached by IIRIRA to an alien's conviction were sufficient to prevent the BIA from precluding Section 212(c) relief. *Atkinson* v. *Attorney Gen.*, 479 F.3d 222 (2007).[1]

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[1] Petitioner (at 21) also cites the Fourth Circuit's decision in *Olatunji* v. *Ashcroft*, 387 F.3d 383 (2004). The retroactivity issue in *Olatunji* involved the loss of an alien's ability to take brief trips abroad without subjecting himself to removal proceedings, *id.* at 395-396, rather than the loss of access to Section 212(c) relief. In fact, *Olatunji* itself distinguished the Fourth Circuit's prior decision in *Chambers* v. *Reno*, 307 F.3d 284 (2002), which did involve Section 212(c). See *Ola-*

Especially given the great weight of authority in the courts of appeals, an intervening development renders review by this Court unwarranted to consider the question whether *St. Cyr*'s holding applies to aliens convicted after a jury trial. A final rule adopted by the Department of Justice to implement *St. Cyr* by amending certain provisions of Title 8 of the Code of Federal Regulations, see *Section 212(c) Relief for Aliens with Certain Criminal Convictions Before April 1, 1997*, 69 Fed. Reg. 57,826 (2004), provides that the 1996 amendments to the INA barring Section 212(c) relief apply to aliens convicted at trial. In its response to comments received on its proposed rule, the Department noted cases holding that "an alien who is convicted after trial is not eligible for section 212(c) relief under *St. Cyr*," and then stated that it "has determined to retain the distinction between ineligible aliens who were convicted after criminal trials[] and those convicted through plea agreements." *Id.* at 57,828. That determination is reflected in the amended regulations, which took effect on October 28, 2004. See *id.* at 57,835 (8 C.F.R. 1212.3(h)) ("Aliens are not eligible to apply for section 212(c) relief under the provisions of this paragraph with respect to convictions entered after trial."). Only a few courts have considered these regulations in deciding whether *St. Cyr*'s holding applies to aliens convicted at trial, see, *e.g.*, *Alexandre* v. *United States Att'y Gen.*, 452 F.3d 1204 (11th Cir. 2006), and this Court should not be one of the first to do so.

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tunji, 387 F.3d at 392 (discussing *Chambers*, 307 F.3d at 293). Even after *Olatunji*, the Fourth Circuit has—directly contrary to petitioner's argument—continued to hold that "IIRIRA's repeal of § 212(c) did not produce an impermissibly retroactive effect as applied to an alien convicted after trial." *Mbea*, 482 F.3d at 281.

d. Finally, even if this case turned on the question whether *St. Cyr* should be extended to an alien who has forgone an appeal,[2] review should be denied. Petitioner identifies only one decision that has addressed that issue. See *Hem*, 458 F.3d at 1200 n.5 ("There is no basis for distinguishing between a decision to give up a right to trial in favor of the possibility of immigration relief and a decision to forego [*sic*] the right to appeal in favor of such a possibility."). In *Hem*, the Tenth Circuit found that aliens who give up a right to appeal could establish objective reliance on their Section 212(c) eligibility based on the likelihood that the category of aliens involved would have so relied. This case, however, deals with a class of aliens who were not even "convicted" of offenses that would render them deportable; any reliance on the availability of Section 212(c) relief would not have been objectively reasonable but rather the product of clairvoyance about Congress's subsequent expansion of the definition of "conviction" and its decision to apply that new definition to convictions entered before IIRIRA's date of enactment.

Because the question of reliance in the context of a forgone appeal has been addressed only by the Tenth Circuit, and there was understandably no discussion of the question by the court of appeals in this case, this case presents no occasion for this Court to address the issue.

2. With respect to the second question presented by the petition, petitioner argues that Congress's application of IIRIRA's new definition of "conviction" to his

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[2] As noted above, petitioner's reliance argument, both in the question presented and in much of the sections of the argument associated with it, is directed at his being found guilty of a deportable offense "after a jury trial." Pet. i, 10, 13.

1994 withheld judgment violates his due process rights because it works a "manifest injustice" by rendering him deportable when he would not previously have been. Pet. 24-27. The court of appeals was correct in summarily affirming the agency's decision to the contrary, and further review is unwarranted. Congress expressly made the revised definition of "conviction" applicable to convictions and sentences entered before IIRIRA's enactment date. Moreover, petitioner cites no conflict among the circuits regarding the issue, and this Court has long recognized that Congress has broad authority to make past criminal activity a new ground for deportation.

a. As this Court has previously explained: "[I]t is beyond dispute that, within constitutional limits, Congress has the power to enact laws with retrospective effect. A statute may not be applied retroactively, however, absent a clear indication from Congress that it intended such a result." *St. Cyr*, 533 U.S. at 316 (citation omitted). As petitioner concedes, "Congress clearly manifested its intent" that the revised definition of "conviction" in Section 322(a)(1) of IIRIRA would "apply retroactively." Pet. 24; see also Pet. 7 ("Congress * * * expressly made the new definition of 'conviction' retroactive."); *St. Cyr*, 533 U.S. at 318-319 n.43 (including IIRIRA § 322(a) among the "specific provisions" that Congress "indicate[d] unambiguously its intention to apply * * * retroactively"). Cf. *Hughes Aircraft Co.*, 520 U.S. at 946 (noting that the presumption against retroactivity does not apply when "Congress has clearly manifested its intent to the contrary").

b. Petitioner not only fails to cite any court of appeals decision finding Congress's retroactive change to the definition of "conviction" to be unconstitutional. His

attempt to establish that retroactive application of the expanded definition of "conviction" works a "manifest injustice" is also particularly unpersuasive in the immigration context. This Court has repeatedly rejected claims that new laws may not be applied to past conduct to render an alien deportable. In *Mulcahey* v. *Catalanotte*, 353 U.S. 692 (1957), the Court held that a permanent-resident alien was made deportable under the 1952 version of the INA as a result of a 1925 narcotics conviction. *Id.* at 692-694. The Court explained that "Congress was legislating retrospectively, as it may do," when it specified in 1952 that aliens were to be deportable for narcotics convictions entered at a time when such convictions would not have been a ground for deportation. *Id.* at 694; see also *Lehmann* v. *United States*, 353 U.S. 685, 690 (1957) (holding that an alien was made deportable under the 1952 version of the INA for 1936 convictions for crimes involving moral turpitude); *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 584-591 (1952) (rejecting due process challenge to deportation of legally resident aliens although their Communist Party memberships terminated before a 1940 statute made membership a ground for deportation).

c. The cases petitioner cites (Pet. 25-26) do not support any finding of manifest injustice in this case. Most of them refused to decide the constitutional question he raises. In *St. Cyr*, this Court acknowledged that "Congress has the power to enact laws with retrospective effect," and it did not address the "constitutional limits" on that power. 533 U.S. at 316. In *Landon* v. *Plasencia*, 459 U.S. 21 (1982), the Court held that an alien in exclusion proceedings has a right to due process, but it expressly stated that it was *not* deciding "the contours of the process that is due or whether the process accorded

[the alien] was insufficient." *Id.* at 32. Moreover, *Landon*, unlike this case, did not deal with the availability of discretionary relief. Similarly, the Seventh Circuit's decision in *Jideonwo* v. *INS*, 224 F.3d 692 (2000)—which predated *St. Cyr*—recognized that courts "will not ordinarily disturb" Congress's express determinations about retroactivity. *Id.* at 698. Because it found that "Congress's intent with regard to the retroactive application of [the statute in question there was] ambiguous," the Seventh Circuit applied a different standard, asking only whether the statute "attache[d] new legal consequences to past conduct." *Ibid.*

The remaining cases cited by petitioner rejected arguments that retroactive application would violate due process. See *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 16-20 (1976); *Bradley* v. *School Bd.*, 416 U.S. 696, 721 (1974). In *Bradley*, the Court noted that "the precise category of cases to which [the 'manifest injustice'] exception applies has not been clearly delineated," *id.* at 717, and petitioner cannot extract any criteria to assist his argument here. Even so, because the "manifest injustice" inquiry must consider "the nature and identity of the parties," "the nature of their rights," and "the nature of the impact of the change in law upon those rights," *ibid.*, petitioner has an even greater burden to shoulder than did the mining companies in *Usery* or the school board in *Bradley*. Congress exercises plenary power over immigration and naturalization, see *Kleindienst* v. *Mandel*, 408 U.S. 753, 766-767 (1972) (citing cases), and, as explained above, this Court has previously sustained deportations on the basis of statutes that made pre-enactment conduct a new ground for deportation.

It is not manifestly unjust to conclude that petitioner—an alien who was found guilty by a jury of committing a crime involving moral turpitude but technically had the criminal judgment against him "withheld"—can be removed from the country and is ineligible for discretionary relief from removal.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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